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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON
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8 DANIEL T. SIGO,

9 Plaintiff,

10 v.

11 JOSEPH LEHMAN, *et al.*,

12 Defendant.
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NO. CV-03-5094-CI

**ORDER ADOPTING REPORT
AND RECOMMENDATION TO
GRANT DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT DISMISSAL**

15 Before the Court is Defendants' Motion for Summary Judgment Dismissal
16 (Ct. Rec. 19). On May 2, 2005, Magistrate Judge Cynthia Imbrogno filed a Report
17 and Recommendation to Grant Defendants' Motion for Summary Judgment
18 Dismissal (Ct. Rec. 41). Plaintiff filed timely objections (Ct. Rec. 42). Plaintiff is
19 proceeding pro se; Assistant Attorney General Stephanie Weigand represents
20 Defendants. The parties did not consent to proceed before a United States
21 Magistrate Judge. The Report and Recommendation (Ct. Rec. 41) is **ADOPTED**
22 in its entirety.

23 In his objections (Ct. Rec. 42), Plaintiff contends that the claims raised in his
24 First Amended Complaint (Ct. Rec. 4) involve issues of Federal Constitutional law,
25 not issues involving prison policies and medical treatment. Plaintiff contends that
26 over 100 exhibits and affidavits (Ct. Rec. 30) establish questions of fact that would
27 preclude dismissal on summary judgment.

28 CLAIM ONE: Plaintiff contends that the fact he has established that

ORDER ADOPTING REPORT AND RECOMMENDATION TO GRANT
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSAL * 1

1 excessive noise exists in his cell demonstrates a violation of the Constitution
2 without proof of injury or medical treatment, citing *Toussaint v. McCarthy*, 801
3 F.2d 1080, 1110 (9th Cir. 1986), *cert. denied*, 48 U.S. 1069 (1987). *Toussaint*
4 made reference to excessive noise as constituting the infliction of pain without
5 penological justification, a finding made by the district court and not challenged on
6 appeal.

7 Plaintiff's claim was properly dismissed; excessive noise must be analyzed
8 under an Eighth Amendment, conditions of confinement standard. Recent case law
9 has upheld dismissal of such claims. Regarding excessive noise, the risk of injury
10 due to the noise conditions must be "so grave that it violates contemporary
11 standards of decency to expose anyone unwillingly to such a risk." *Helling v.*
12 *McKinney*, 509 U.S. 25, 35 (1993); *Lunsford v. Bennett*, 17 F.3d 1574, 1580 (7th
13 Cir. 1994) (affirming summary judgment for prison officials who allegedly
14 subjected prisoners to loud noises over an intercom during a 24-hour period; "[t]he
15 record contains no evidence that the noise levels posed a serious risk of injury to
16 the plaintiffs. Subjecting a prisoner to a few hours of periodic loud noises that
17 merely annoy, rather than injure the prisoner does not demonstrate a disregard for
18 the prisoner's welfare."); *Murphy v. Dowd*, 975 F.2d 435, 437 (8th Cir. 1992) (per
19 curiam) (affirming judgment for prison officials, finding excessive noise claim was
20 meritless); *Givens v. Jones*, 900 F.2d 1229, 1234 (8th Cir. 1990) (affirming
21 summary judgment for prison officials in suit alleging excessive noise caused by
22 remodeling in prison; court finds noise is "a fact of life" and that the claim "on its
23 face appears almost specious;" inmate failed to claim the noise was result of
24 malicious intent or even reckless disregard for his well-being); *Peterkin v. Jeffes*,
25 855 F.2d 1021, 1027 (3d Cir. 1988) ("the noise in the cells, while it may be
26 irritating to some prisoners, cannot fairly be said to inflict cruel and unusual
27 punishment").

28 CLAIM TWO: Plaintiff contends that the Report and Recommendation erred

1 by dismissing his claim involving use of two pillows as ordered by a health status
2 report. He asserts this is not an issue involving denial of medical treatment but,
3 rather, a constitutional violation. Once again, this is a claim that must be analyzed
4 under the Eighth Amendment indifference to medical needs standard. There is no
5 evidence to raise a material question of fact that the denial of two pillows, in light
6 of the other bedding issued to Plaintiff while he was in segregation, constituted a
7 violation of the Eighth Amendment.

8 CLAIM THREE: Plaintiff summarily contends that the Report and
9 Recommendation erroneously analyzed the denial of physical therapy as a medical
10 claim, rather than a “constitutional” claim. The denial of physical therapy would
11 be analyzed under the Eighth Amendment indifference to medical needs standard.
12 Placement in the intensive management unit and the security requirements
13 attendant thereto prohibited physical therapy treatments. As noted by the treating
14 physician, physical therapy was only one alternative for treatment of Plaintiff’s
15 shoulder pain. It is undisputed that a cortisone shot was successful in treating the
16 condition.

17 CLAIM FIVE: Plaintiff contends that the Report and Recommendation
18 erroneously dismissed his claim involving inadequate clothing, shoes, and coats for
19 use in the exercise yard. Once again, Plaintiff asserts the Report and
20 Recommendation erred in analyzing this claim as a medical issue for which there
21 was no evidence that suggested Plaintiff’s health suffered as a result of inadequate
22 clothing for use in the exercise yard during inclement weather. Plaintiff contends
23 that he is entitled, under the Constitution, to outside exercise time. The Report and
24 Recommendation acknowledges that exercise is a life necessity protected under the
25 Eighth Amendment (Ct. Rec. 41 at 12). However, it was also undisputed that
26 exercise outdoors in inclement weather was optional, outdoor coats were made
27 available, as well as socks for use with open-toed sandals.

28 CLAIM SIX: Plaintiff claims that the Report and Recommendation

1 erroneously dismissed his claim involving lack of running water in his cell. The
2 claim was dismissed because there was no evidence the lack of running water was
3 intentional for the purpose of creating serious risk to Plaintiff's safety and health.
4 The Eighth Amendment analysis of conditions of confinement requires both an
5 objective and subjective component. *Hudson v. McMillan*, 503 U.S. 1 (1992).
6 Here, there was no material question of fact regarding the subjective component.

7 CLAIM SEVEN: Plaintiff contends that the Report and Recommendation
8 erroneously dismissed his claim involving constant illumination, citing *Lemaire v.*
9 *Maass*, 745 F. Supp. 623, 636 (D. Or. 1990), 12 F.3d 1444 (9th Cir. 1993). Plaintiff
10 has presented no evidence the lighting was other than minimal and necessary for
11 security, nor has he presented evidence of subjective intent, i.e., that Defendants
12 intentionally maintained the lights at a risk to Plaintiff's health and safety.

13 CLAIM NINE: Plaintiff contends that he was denied First Amendment
14 access to the courts, resulting in a 2.5 year difference in his release date. In light of
15 the status of state court proceedings at the time the alleged violation occurred, and
16 Plaintiff's limited right to appeal under the Anti-terrorism and Effective Death
17 Penalty Act, 28 U.S.C. § 2244 (2005), no material question of fact has been raised.

18 Having reviewed the Report and Recommendation and considered the timely
19 objections thereto,

20 **IT IS ORDERED** that the Report and Recommendation is **ADOPTED** in
21 its entirety, and Defendants' Motion for Summary Judgment Dismissal (Ct. Rec.
22 19) is **GRANTED**.

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28 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
ORDER ADOPTING REPORT AND RECOMMENDATION TO GRANT
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSAL * 4

1 Order and forward copies to counsel.

2 **DATED** this 10th day of August, 2005.

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4 s/ ROBERT H. WHALEY
5 UNITED STATES DISTRICT JUDGE
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